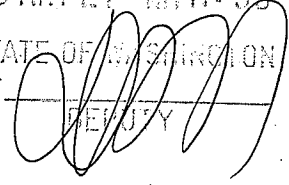


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DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

No. 38629-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jesse Willingham,

Appellant.

Jefferson County Superior Court Cause No. 08-1-00182-8

The Honorable Judge Craddock Verser

Respondent's Brief

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STATEMENT OF ISSUE

Was the trial judge within his discretion in deciding that Mr. Willingham was usually and publicly resident within Washington from 2005 until 2008, despite an alleged two-week absence in June of 2008?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jesse Willingham was charged with Indecent Liberties. CP 1. The original Information, filed on August 14, 2008, charged incidents alleged to have occurred on or about July 1 and August 1, 2005. CP 1. An Amended Information alleged that Mr. Willingham was absent from Washington from June 2 through June 16, 2008, and the state argued that that this two-week period tolled the statute of limitations. CP 37-38.

The trial judge decided that Mr. Willingham was usually and publicly resident within this state (since any absence was brief and temporary) and dismissed the prosecution with prejudice. RP (11/4/08) 34-36; CP 43. The state appealed. CP 44.

ARGUMENT

THE STATUTE OF LIMITATIONS WAS NOT TOLLED BY MR. WILLINGHAM'S BRIEF AND TEMPORARY ABSENCE FROM WASHINGTON, BECAUSE HE WAS AT ALL RELEVANT TIMES USUALLY AND PUBLICLY RESIDENT WITHIN THIS STATE.

Statutory interpretation "always begins with the plain language of the statute." *State v. Christensen*, 153 Wn.2d 186, 194, 102 P.3d 789, (2004). The court must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous. *State Owned Forests v. Sutherland*, 124 Wn.App. 400, 410, 101 P.3d 880 (2004).

RCW 9A.04.080(1) provides that “[p]rosecutions for criminal offenses shall not be commenced after the periods prescribed in this section.” RCW 9A.04.080(1). Under the statute, a charge of indecent liberties may not be commenced “more than three years after its commission.” RCW 9A.04.080(1)(h). There is an exception to the statute of limitations, which provides that “[t]he periods of limitation prescribed in subsection (1) of this section do not run during any time when the person charged is not usually and publicly resident within this state.” RCW 9A.04.080(2).

Under the plain language of the statute, tolling occurs only when the accused is “not usually and publicly resident.” RCW 9A.04.080(2). Thus, a person whose usual and public residence is within the state may temporarily leave and return without tolling the statute.¹ RCW 9A.04.080(2).

In this case, the court found that Mr. Willingham was usually and publicly resident within the state from 2005 through 2008. RP (11/4/08) 35-36. Although Mr. Willing traveled to Utah for a temporary job, he continued to use his Washington address during the two weeks he was

¹ Even if the statute were believed to be ambiguous, the rule of lenity would require that it be interpreted in favor of the accused. *State v. Mendoza*, ___ Wn.2d ___, ___, 205 P.3d 113, 119 (2009).

absent from the state. RP (11/4/08) 35. Accordingly, his two-week absence did not toll the statute of limitations. RCW 9A.04.080.

Respondent's argument to the contrary is incorrect. Brief of Respondent, pp. 4-9. Respondent relies on cases that found tolling even where the accused persons were not fugitives, but lived openly outside of Washington. Brief of Respondent, pp. 4-8, citing *State v. Israel*, 113 Wn. App. 243, 54 P.3d 1218 (2001) and *State v. Ansell*, 36 Wn.App. 492, 675 P.2d 614 (1984). Respondent's authorities are inapposite. Unlike the defendants in *Israel* and *Ansell*, Mr. Willingham did not abandon his Washington residence. Thus he was not merely open about his trip to Utah; he was open about the trip and continued to reside in Washington.

Authority from other jurisdictions supports this interpretation of the statute. For example, the federal courts have held that brief trips outside the jurisdiction do not toll the statute of limitations in tax cases. See, e.g., *United States v. Gross*, 159 F.Supp. 316, 321 -322 (D.Nev. 1958) ("[S]poradic and intermittent trips to points outside the judicial district wherein the offense is alleged to have been committed, such as were taken by defendants in the instant case, are not 'absences from the district' within the tolling proviso"); *United States v. Beard*, 118 F.Supp. 297 (D.C.Md. 1954); *United States v. Mathis*, 28 F.Supp. 582, 584 - 585 (D.C.N.J. 1939) ("I cannot bring myself to the conclusion that

Congress intended the [tolling provision] to apply to a resident of the district, who maintained a home therein and who was out of the district for varying periods of time for business, official, personal or pleasure trips”).

This interpretation of tolling provisions dates at least as far back as the Civil War, when a Pennsylvania court barred the prosecution of a returning veteran for the crime of adultery:

[W]e think that all the time he was in the service his absence was temporary, and that he remained “an inhabitant of the state or usual resident therein,” so that there was not the least obstacle in the way of instituting a prosecution against him, or even in claiming him to answer. His usual residence was not changed by the fact that he obeyed the call of the president, and volunteered to fight for his country at her command.

Graham v. Commonwealth of Pennsylvania, 51 Pa. 255 (1866).

Against this authority, Respondent has no cases directly on point, and so urges a “liberal interpretation” of the tolling provision because of the alleged victim’s developmental disabilities. Brief of Respondent, pp. 8-9. Respondent cites no authority for this proposed rule of statutory construction. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007).

As Respondent points out, the legislature has provided for delayed reporting of certain crimes. Brief of Respondent, p. 8 (citing RCW

9A.04.080). The fact that it hasn't done so for Indecent Liberties is telling.²

Mr. Willingham was usually and publicly resident within this state during the running of the limitations period. Thus the statute did not toll during the two weeks he spent in Utah, and the trial court correctly dismissed this prosecution for Indecent Liberties.

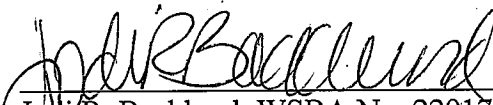
² Where the legislature specifically designates the things to which a statute applies, there is an inference that omissions were intentional. *Queets Band of Indians v. State*, 102 Wn.2d 1, 5, 682 P.2d 909 (1984). In such cases, "the silence of the Legislature is telling." *Queets Band of Indians*, at 5. In other words, *expressio unius est exclusio alterius* – specific inclusions exclude implication. *State v. Sommerville*, 111 Wn.2d 524, 535, 760 P.2d 932 (1988).

CONCLUSION

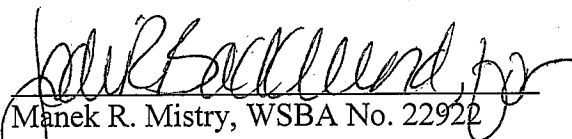
For the foregoing reasons, the trial court's decision must be affirmed.

Respectfully submitted on May 20, 2009.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of the Respondent's Brief to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 20, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 20, 2009.



Jodi R. Backlund, WSBA No. 22917
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